

### **BULLETS ON FITNESS TO HOLD FCC LICENSES**

- The Commission considers the character and fitness of parties seeking to become or remain FCC licensees to be of such importance that in 1985 it promulgated a *Character Policy Statement* so that applicants and licensees would be aware of the Commission's character and fitness requirements for holding FCC authorizations. *See Policy Regarding Character Qualifications in Broadcast Licensing*, Report, Order and Policy Statement, 102 F.C.C. 2d 1179 (1985) ("*Character Policy Statement*").
  - Although the character standards were originally applied to broadcast licensees, the Commission has found that the standards "can provide guidance in the common carrier area as well," *MCI Telecommunications Corp.*, Order and Notice of Apparent Liability, 3 FCC Rcd 509, 515 n.14 (1998), and has routinely applied the standards to carriers holding Title III licenses, *e.g.*, *Southern New England Telecommunications Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21305 (1998).
- The primary focus of the Commission's character requirements has involved "FCC-related" behavior. In developing its character standards, the Commission "focused on specific traits which are predictive of an applicant's propensity to deal honestly with the Commission and comply with the Communications Act and the Commission's rules or policies." *Character Policy Statement*, 102 F.C.C. 2d at 1189.
- "Generally, breach of the duty to be truthful to the Commission takes two basic forms: (1) misrepresentation, and (2) lack of candor (failure to disclose). The former involves false statements of fact; the latter involves concealment, evasion, or other failure to be fully informative. Thus, an applicant's duty can be breached by affirmative misrepresentations and/or by a failure to come forward with a candid statement of relevant facts, whether or not such information is particularly elicited by the Commission." *Applications of Westel Samoa, Inc.*, Memorandum Opinion and Order, Hearing Designation Order, Notice of Opportunity for Hearing, and Order to Show Cause, 12 FCC Rcd. 14,057 (1997) at ¶ 38 ("*Westel*").
  - "Mr. Breen's failure to timely inform the Commission about material facts of which he was aware constitutes a breach of duty to the Commission and raises a substantial and material question of fact as to whether Mr. Breen lacked candor before the Commission. As the majority shareholder in Westel, Mr. Breen's misconduct calls into question whether Westel is qualified to be a Commission licensee. Accordingly, Westel's applications will be designated for a hearing in this consolidated proceeding." *Westel* at ¶ 48.
- In particular, the Commission has described the duty of licensee candor as "basic and well known." *See Sea Island Broadcasting Corp. v. FCC*, 627 F.2d 240, 243 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 834 (1980) ("*Sea Island*").
  - The Commission has explained that "As we noted in the Character Policy Statement, we are authorized to treat even the most insignificant

misrepresentations as serious.” *Applications of PCS 2000, L.P.*, Notice of Apparent Liability for Forfeiture, 12 FCC Rcd 1703 (1997) at ¶ 47.

- See also 47 C.F.R. § 1.17 (providing that no person, in any investigation or adjudicatory proceeding, shall “intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading”).
- In many cases, the Commission has disqualified companies from holding FCC authorizations. See, e.g., *Radio Carrollton*, Memorandum Opinion and Order, 69 F.C.C.2d 1139 (1978) at ¶¶ 11,17 (“Thorburn's testimony on this matter before the Commission evinces an unmitigable lack of candor bordering on deception, conduct the Commission cannot and will not tolerate. . . . Through this conduct, Faulkner has demonstrated that it does not possess the qualifications to be a licensee. Accordingly, we conclude that the public interest would not be served by a renewal of Faulkner's license.”)
- The Commission has found that “[o]nce we find that we cannot rely on a licensee's representations to us, the only suitable penalty is revocation of the license.” *Sea Island*, 60 F.C.C.2d at 157 (revoking license because the owner and officers of the licensee company made deliberate misrepresentations and other misleading and deceptive statements to the Commission in order to conceal improper financial practices); *RKO General, Inc.*, Decision, 78 F.C.C.2d 1 (1980), *aff'd*, 670 F.2d 215 (D.C. Cir. 1981) (denying an application based upon applicant's lack of candor in proceedings before the FCC).
- In *Pass Word, Inc.*, a radio common carrier falsely certified to the FCC that it had completed its construction obligations (pursuant to a construction permit), in order to obtain a grant of its licenses. The FCC revoked Pass Word's licenses:
  - “Among [the] documents are forms and letters filed with the Commission certifying the operative status of facilities for which construction permits had been issued. As detailed herein, the Commission finds that Pass Word and Bacon filed documents with the Commission in 1974 representing that construction of certain facilities had been completed in accordance with the term of the construction permit, and that equipment and service tests would begin shortly, when in fact the facilities were not ready for operation. The record establishes that equipment essential for operation of the facilities was not on hand when the representations were made, and that construction was completed and service commenced long after the expiration of the construction permits. Moreover, the record establishes that Bacon, individually and as the chief operating officer of Pass Word, concealed facts in correspondence, pleadings and forms filed over a three-year period regarding construction of the facilities and the Commission's inquiry pertaining thereto. The facts establish that the concealment was deliberate and that Bacon deliberately made misrepresentations to the Commission.” *Pass Word, Inc.*, Order to Revoke Licenses, 76 F.C.C.2d 465 (1980) at ¶ 10, *aff'd*, *Pass Word, Inc. v. FCC*, 673 F.2d 1363 (D.C. Cir. 1982).

- “Section 312(a)(3) explicitly grants authority to the Commission to revoke a license for willful or repeated failure to operate substantially as set forth in the license. Had we been apprised that the 454 MHz channels had not been constructed and ready to operate by the expiration date of the construction permits and why, we would have been warranted in refusing to grant a license to cover those channels and in revoking the construction permit. Bacon did not in fact construct the channels in a timely manner and demonstrated no diligence in attempting to do so. Bacon willfully failed to construct and provide service and thus to operate as set forth in the licenses. It is important that a permittee, having received a valuable privilege, take immediate steps to construct the facilities that are to be dedicated to public service. A disregard for the construction period terms not only deprives the public of the service which has been represented as unfulfilled, but also ties up the frequency so another applicant is unable to meet the need. Thus, even if these had been no deliberate misrepresentation, revocation would have been appropriate in the factual situation described herein.” *Id.* at ¶ 122.
- The FCC rejected Pass Word’s request for a monetary forfeiture in lieu of revocation, stating “There is no question that revocation is an appropriate remedy under the Act where there has been a repeated pattern of deliberate misrepresentation and concealment to this Commission. Section 312(a)(1). *FCC v. WOKO, Inc.*, 329 U.S. 223 (1949). *Sea Island Broadcasting Corp.*, 60 F.C.C. 2d 146 (1976), *aff’d*, F. 2d, No. 76-1735 (D.C. Cir. Jan. 14, 1980). This same standard is applied to common carrier licensees. *The Telephone Co., et al.*, 65 F.C.C. 2d 605 (1977).” *Id.* at ¶ 121.
- The FCC has specifically disqualified licensees based on misleading renewal applications. *See RKO General, Inc.*, 78 FCC 2d 1, 98 (1980) (submissions to the Commission 'containing statements that are 'technically correct' but misleading as to the known facts' amount to lack of candor). In affirming the Commission's disqualification of the licensee in RKO solely on the grounds of lack of candor, the Court of Appeals stated:
  - “Section 1.65 of the Commission's Rules requires applicants to inform the Commission within thirty days whenever 'there has been a substantial change' regarding any matter that may be 'of decisional significance in a Commission proceeding involving the pending application.' This requires that an applicant inform the Commission 'of all facts, whether requested in [renewal] Form 303 or not, that may be of decisional significance so that the Commission can make a realistic decision based on all relevant factors.’” *RKO General, Inc. v. FCC*, 670 F.2d 215, 229 (1981) (internal citations omitted).